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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1420

JOSEPH F. YOUNG,
Petitioner,

v.

ADA M. SCOTT, for herself, her daughter JACQUELINE A. SCOTT, an infant, and for others similarly situated,

and

UNITED STATES OF AMERICA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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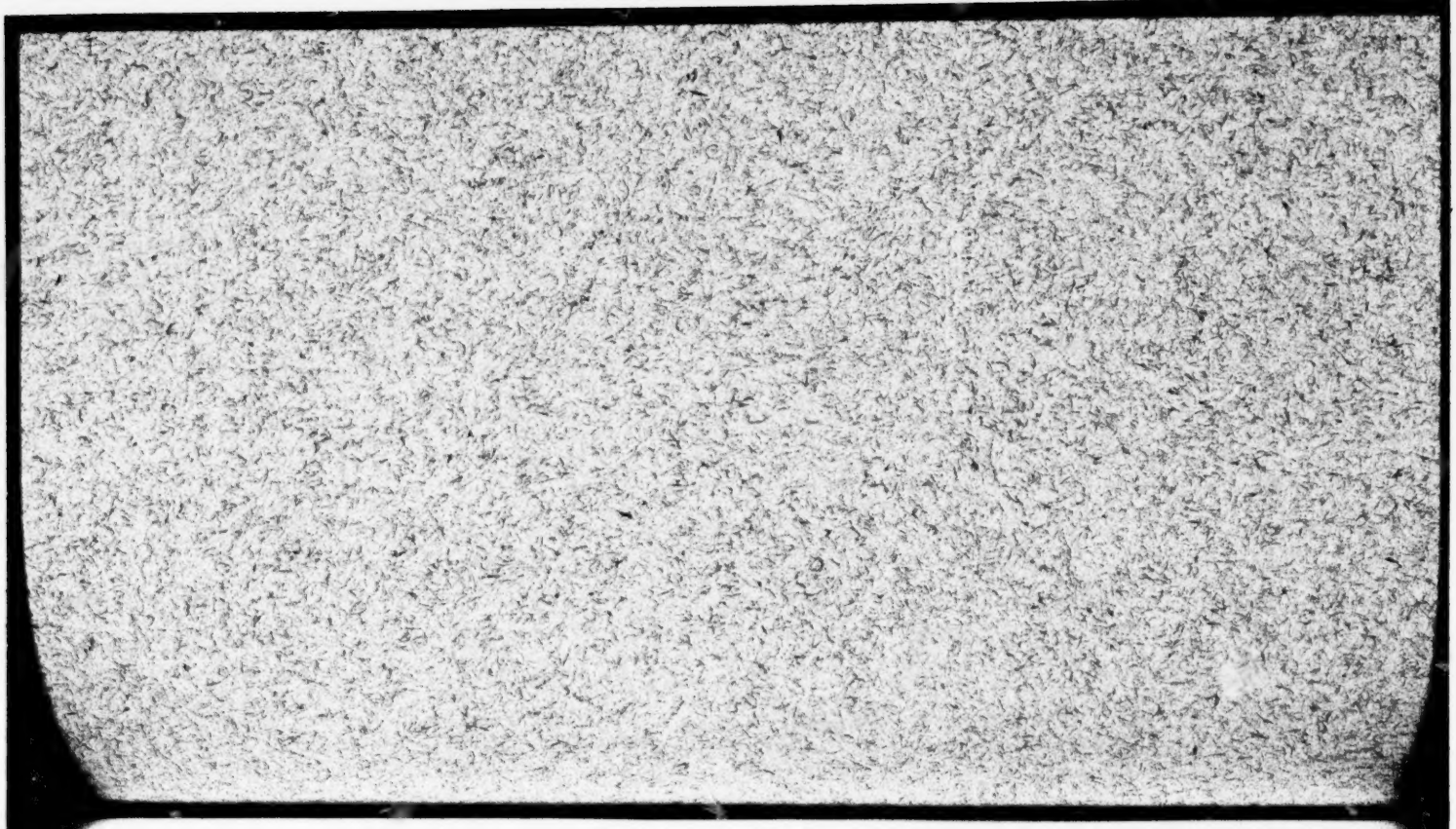


INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement of the Case	4
Reasons Relied on for Allowance of Writ	6
Argument:	
I. Absent a Statutory Prohibition, Petitioner May Select His Own Customers.	7
II. The Civil Rights Act of 1866 Does Not Prohibit Private Discrimination in Picnic Park Admissions.	8
III. The Timberlake Picnic Park is Not a Place of 'Exhibition or Entertainment' Under the 1964 Civil Rights Act.	10
IV. It Was Patent Error to Revoke an Existing Consent Decree Absent Some Change of Fact...	15
Conclusion	17
Appendix:	
Consent Decree	1a
Opinion and Order of District Court	4a
Opinion and Order of Court of Appeals	12a

TABLE OF AUTHORITIES

Cases:

	Page
Civil Rights Cases, 109 U.S. 3 (1883)	6, 9
Collins v. *City of Wichita*, 254 F.2d 837, (10th Cir. 1958)	16
Cuevas v. *Sdrales*, 344 F.2d 1019, (10th Cir. 1965)	11
Daniel v. *Paul*, 395 298, 89 S.Ct. 1683 (1969)	2, 5, 6, 12, 13
Dobbins v. *Local 212*, 292 F.Supp. 413 (S.D. Ohio 1968)	10
Elizabeth Hospital, Inc. v. *Richardson*, 269 F.2d 167 (8th Cir. 1959)	13
Federal Trade Commission v. *Raymond Co.*, 263 U.S. 565, 44 S.Ct. 162 (1924)	7
Great Atlantic & Pacific Tea Co. v. *Cream of Wheat Co.*, 227 Fed. 46 (2nd Cir., 1915)	7
Jones v. *Alfred H. Mayer Co.*, 392 U.S. 409, 88 S.Ct. 2186 (1968)	4, 6, 8, 9
Lehman Co. v. *Appleton Toy & Furniture Co.*, 148 F.2d 988 (7th Cir. 1945)	16
May v. *Moss*, 194 F.2d 133 (8th Cir. 1952)	15
Miller v. *Amusement Enterprises, Inc.*, 394 F.2d 342 (5th Cir. 1968)	4, 12, 13
Peterson v. *City of Greenville, South Carolina*, 373 U.S. 244, 83 S.Ct. 1119 (1963)	7
Polish Nat. Alliance v. *NLRB*, 322 U.S. 643, 650, 64 S.Ct. 1196 (1944)	14
Safeway Stores, Inc. v. *Coe*, 136 F.2d 771 (D.C. Cir. 1943)	16
Shelley v. *Kraemer*, 334 U.S. 1, 68 S.Ct. 836 (1948)	7
Sturges v. *Crowinshield*, 4 Wheat. 122 (1819)	9
Sullivan v. *Little Hunting Park, Inc.* —— U.S. ——, 90 S.Ct. 400 (1969)	8
Title v. *United States*, 263 F.2d 28 (9th Cir. 1959)	16
United States v. *Colgate & Co.*, 253 Fed. 522 (E.D.Va., 1918), aff. 250 U.S. 300, 39 S.Ct. 465 (1919)	7

Page

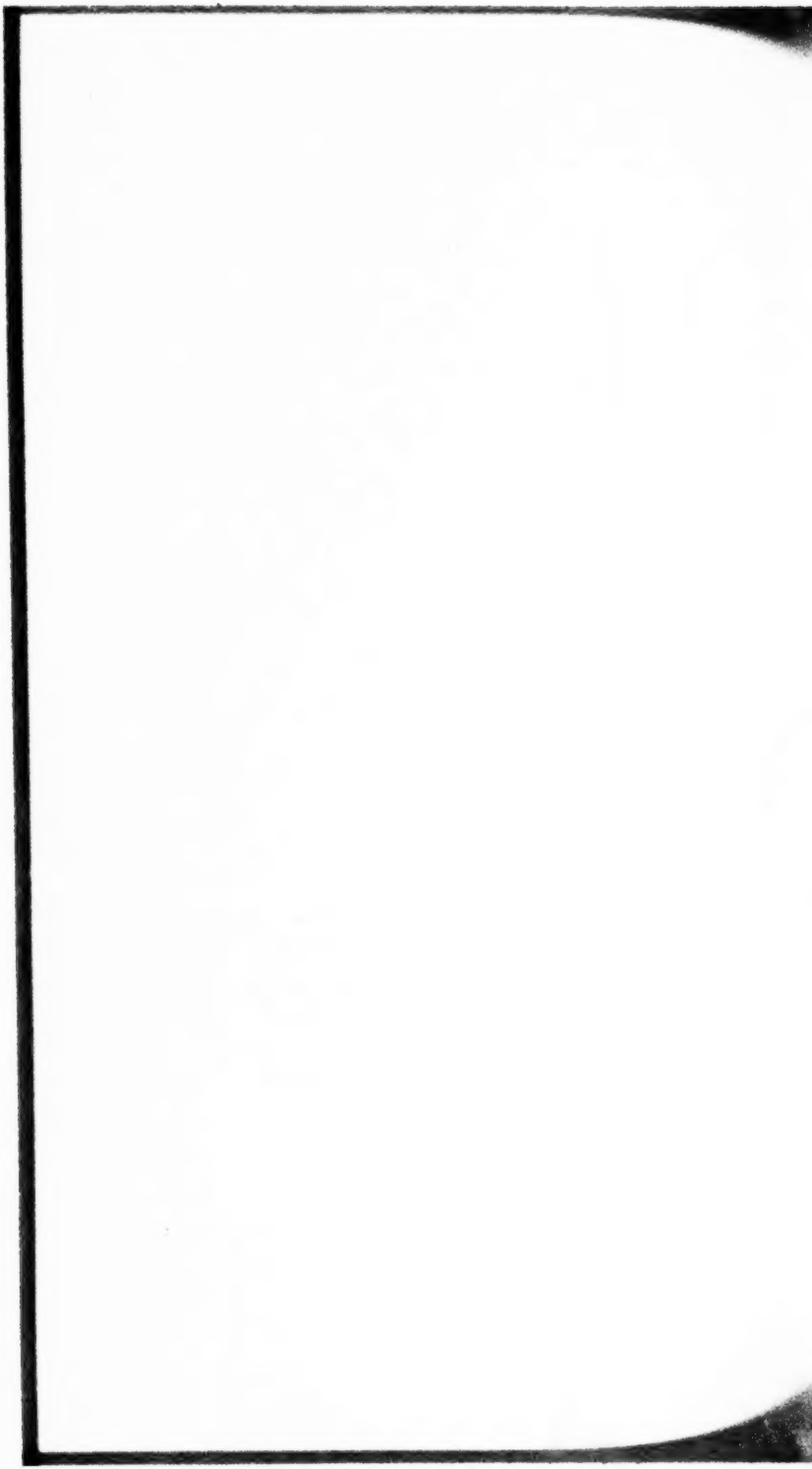
United States v. *Int'l Boxing Club of N. Y.*, 348 U.S. 236, 241, 75 S.Ct. 259 (1955) 14
United States v. *Med. Soc. of So. Car.*, 298 F. Supp. 145 (D.S.C. 1969) 10
Valle v. *Stengel*, 176 F.2d 697 (3rd Cir. 1949) 9
Williams v. *Howard Johnson's*, 210 F.Supp. 295, 268 F.2d 845, 342 F.2d 727 (4th Cir. 1965), cert. den., 382 U.S. 814 ..... 8, 13
Williams v. *Kansas City*, 104 F.Supp. 848 (W.D. Mo. 1952), aff'd 205 F.2d 47 (8th Cir. 1953), cert. den., 346 U.S. 926 (1953) .....

Statutes:

28 U.S.C. § 1254 2
42 U.S.C. 1981, 1982 (The Civil Rights Act of 1866, as am.) 2, 3, 4, 8, 10
42 U.S.C. 2000a, et seq. (The Civil Rights Act of 1964) 2, 3, 4, 6, 7, 9, 10, 14
Rule 60(b)(6) (Federal Rules of Civil Procedure) 5, 16

Miscellaneous:

110 Cong. Rec. 6533, March 30, 1964 11
110 Cong. Rec. 6557, March 30, 1964 11
110 Cong. Rec. 7407, April 9, 1964 12
Cong. and Adm. News, 88th Cong. 2nd Sess., 1964, pp. 2415, 2483 13
H. Rep. No. 914, 88th Cong., 2nd Sess., 1964; Cong. and Adm. News, 1964, p. 2410 12
Hearings, House Jud. Comm. on H. R. 7152 as am., 88th Cong., 1st Sess., pp. 2655-56 11



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. ———

JOSEPH F. YOUNG,
Petitioner,

v.

ADA M. SCOTT, ET AL., and UNITED STATES OF AMERICA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners respectfully pray the issuance of a writ of certiorari to review a ruling of the United States Court of Appeals for the Fourth Circuit—affirming a holding of the United States District Court for the Eastern District of Virginia—that (a) non-discrimination in all forms of private contracting is required by the 1866 Civil Rights Act and (b) picnickers engaged in 'sunbathing and girl watching' at a 23 acre private park in the Fairfax woods are "sources of entertainment which move in commerce" within the meaning of the 1964 Civil Rights Act.

OPINIONS BELOW

The case was originally disposed of by a consent decree on December 5, 1966 and no opinion was issued. This decree appears in the Appendix at page 1a.

The opinion of the District Court following the revival of the case in 1968 is not officially reported. It is printed, together with the Order entered thereon in the Appendix starting at page 4a.

The opinion of the United States Court of Appeals for the Fourth Circuit has not been officially reported, and is appended hereto at page 12a. The order of the Circuit for the reversal of which this application is submitted, is included at page 17a.

JURISDICTION

The judgment of the Court of Appeals sought to be reviewed was dated and entered January 16, 1970.

The jurisdiction of this Court is invoked under Section 1254 of the Judicial Code (28 U.S.C. § 1254).

QUESTIONS PRESENTED

1. Is non-discrimination required in every private commercial transaction by reason of the "right to make and enforce contracts" phrase of the Civil Rights Act of 1866 (42 U.S.C. 1981)?

2. Is the Fairfax picnic lake here in question a 'place of entertainment' 'affecting commerce' within this Court's holding in *Daniel* v. *Paul*, 395 U.S. 298 (1969) construing section 201(b)(3) of the Civil Rights Act of 1964?

3. Is a change of law a basis for setting aside a consent decree?

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STATUTES INVOLVED

The Civil Rights Act of 1964 (42 U.S.C 2000a et seq.)

"§ 201(a) (42 U.S.C. 2000a(a)O). All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

§ 201(b) (42 U.S.C. 2000a(b)). Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce . . .:

. . .

(3) Any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; . . .

. . .

§ 201(c) (42 U.S.C. 2000a(c)). The operations of an establishment affect commerce within the meaning of this title if . . .

(3) in the case of an establishment described in paragraph (3) of subsection (b), it customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce; . . . For purposes of this section, "commerce" means travel, trade, traffic, commerce, transportation, or communication among the several states, or between the District of Columbia and any state . . . ."

The Civil Rights Act of 1866 (42 U.S.C. 1981, 1982)

§ 1981. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens.

§ 1982. All citizens of the United States shall have the same right, in every State and Territory, as it

enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

STATEMENT OF THE CASE

Proceedings Below

The complaint was filed on October 6, 1965 under the Civil Rights Act of 1964 to compel this petitioner to admit Negroes to a picnic park operated by him in the Fairfax woods in Northern Virginia ('Timberlake'). After joinder of issue and discovery, all parties entered into a consent decree (App. p. 1a) approved by the District Court requiring petitioner to close his snack bar as a condition precedent to the continued operation of Timberlake.

Two years later, asserting that the *en banc* reversal in *Miller* v. *Amusement Enterprises, Inc.*, 394 F.2d 343 (5th Cir., 1968) holding self-amusement to be 'entertainment' changed the law under which it had accepted the consent decree, the United States, as plaintiff-intervenor filed a "Motion for Further Relief" before the District Court to void its prior consent, set aside the earlier decree, and require admission of Negroes on the ground that the picnic area was a 'place of entertainment' which affected interstate commerce within the meaning of the Act.

The individual respondents then filed a motion for the same relief on the basis of this Court's decision in *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 88 S.Ct. 2186 (1968) charging that a denial of admittance to Timberlake was a denial of the right to contract under the Civil Rights Act of 1866.

All significant facts about Timberlake were stipulated or admitted in 1965, and no change of fact occurred thereafter except the closing of petitioner's snack bar under the consent decree.

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On July 10, 1969 the District Court (App. p. 4a) held that under the reservation of jurisdiction clause in the 1966 consent decree and "any other reason" clause of Rule 60(b)(6) of the Federal Rules of Civil Procedure, it had authority to revoke the existing consent decree and reverse the earlier determination without change of fact, and did so, sustaining the contentions of both respondents, adding that this Court's ruling in *Daniel* v. *Paul*, 395 U.S. 298 (1969) established Timberlake as a 'place of entertainment' under the 1964 Act. The Court of Appeals affirmed, finding Timberlake to be a "carbon copy of the Lake Nixon facilities the Supreme Court reviewed in *Daniel* v. *Paul*."

No pleading, opinion, or order of any Court or party relies on state action or constitutional grounds. Only the interpretation of the two statutes was considered and ruled on.

Facts

Timberlake is a privately owned and operated 23 acre picnic park in the Fairfax woods near Oakton, Virginia, 4 miles from the nearest interstate highway. It was built up by petitioner over a ten year period for use by families in the Washington area who have been customers during most of this period. It is not licensed by any governmental authority nor is any such license required.

It has picnic tables for eating, two small artificial lakes for swimming, 10 canoes for boating, 2 rafts and some used inner tubes for floating. Until closed by this suit, Timberlake was nothing more than a place to go to picnic and swim in the woods, a place whose principal activities were described by the District Court as "sunbathing and girl watching" (App. p. 5a). It was essentially the "purely local swimming hole" referred to in Mr. Justice Black's dissent in *Daniel* v. *Paul*.

The largest amount of advertising done by Timberlake was the placing of four 4 x 5 inch ads in the Washington

Sunday Star in a single year. There are no brochures, no roadside billboards, no radio or television, or any other advertising except word of mouth.

Timberlake had no mechanical rides, skating rinks, spectator stands, paddle boats, miniature golf course, juke box, dance floor, nor, after the consent decree, did it serve any food or drink items.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE RIGHT

1. This petition brings before this Court for the first time since the *Civil Rights Cases*, the application of the 1866 Civil Rights Act to the making of contracts by individuals. The question of the continued validity of this Courts earlier ruling, that the statute did not eliminate individual freedom to select customers, was specifically put aside in *Jones* v. *Mayer*, 392 U.S. 409 (1968) (ftn. 78, p. 441). Because of the almost unlimited applicability of the word 'contract' in law, an early decision on this point is of the utmost practical importance.

2. This petition also presents the question of whether there is any excepted *de minimis* situation under the 1964 Civil Rights Act coverage, or whether as Mr. Justice Black feared, it is to be extended to the "every little remote country place of recreation" (395 U.S. 298 at 315). Determination of the limits involved is important to the continued operation under the statute of the hundreds or thousands of similar picnic areas.

3. The reopening and reversal of a civil rights consent decree without any intervening change of fact, is contrary to precedent in this Court and in the Circuits and affects the day to day administration of the federal courts to such a degree that its early resolution by this Court would be desirable.

ARGUMENT

I

Absent a Statutory Prohibition, Petitioner May Select His Own Customers

Apart from such prohibitions as Congress may enact under the authority of Sec. 2 of the Thirteenth Amendment, the petitioner would have an absolute right to select his own customers and could make such selection on any basis, whether his own or the associational preferences of his patrons. It was so provided at common law; *Great Atlantic & Pacific Tea Co.* v. *Cream of Wheat Co.*, 227 Fed. 46 (2d Cir., 1915) adopting from *Cooley on Torts* the statement,

> "It is part of a man's civil rights that he be at liberty to refuse business relations with any person whomsoever whether the refusal rests upon reason, or is the result of whim, caprice, prejudice or malice."

That ruling was in turn cited with approval by this Court in *Federal Trade Commission* v. *Raymond Co.*, 263 U.S. 565, and by the District Court here involved in *United States* v. *Colgate & Co.*, 253 Fed. 522 (E.D. Va., 1918), aff. 250 U.S. 300 (1919).

Nor is the private right to discriminate limited by the Constitution; *Shelley* v. *Kraemer*, 334 U.S. 1, 69 S.Ct. 836 (1948). In *Peterson* v. *City of Greenville, South Carolina*, 373 U.S. 244, 83 S.Ct. 1119 (1963) this Court stated:

> "It cannot be disputed that under our decision 'private conduct abridging individual rights does no violence to the equal protection clause unless to some significant extent the state in any of its manifestations has been found to have become involved in it."

And the Circuit below, prior to the 1964 Civil Rights Act, repeated this principle in the series of cases by

Williams against the *Howard Johnson's* restaurant in Alexandria (e.g., 210 F.Supp. 295; 268 F.2d 845; 342 F.2d 727 (4th Cir. 1965), cert. den. 382 U.S. 814).

Accordingly, petitioner was free to limit admission to Timberlake as requested by his patrons unless prohibited by statute.

II

The Civil Rights Act of 1866 Does Not Prohibit Private Discrimination in Picnic Park Admissions

The Civil Rights Act of 1866 (42 U.S.C. §§ 1981, 1982) provides in § 1981 that all persons shall have the same right to make and enforce contracts, to sue, and to benefit from laws for the "security of persons and property" as "is enjoyed by white citizens." As noted in the prior point, the common law then existing was that no "white citizen" had a legal right to demand admittance to a privately run facility like Timberlake.

42 U.S.C. § 1982 grants the further right to all persons,

> "To inherit, purchase, lease, sell, hold, and convey real and personal property."

The Fourth Circuit, in the ruling here complained of, cited (App. p. 15a) two decisions of this Court under § 1982, *Jones* v. *Mayer*, 392 U.S. 409 (1968) and *Sullivan* v. *Little Hunting Park, Inc.*, —— U.S. ——, 90 S.Ct. 400 (1969), from which it concluded,

> "The provision invoked in this case, § 1981, the sister to § 1982, must be construed in similar broad fashion."

and held accordingly that § 1981 creates an obligation of non-discrimination in every private commercial transaction—such as an admission to Timberlake—which the law would define as a contract. So interpreted, the statute would necessarily apply to every non-social event between individuals since,

> "A contract is an agreement in which a party undertakes to do, or not to do, a particular thing." Marshall, Ch. J. in *Sturges* v. *Crowinshield*, 4 Wheat. 122 (1819).

It would apply to every privately organized or owned church, club, school or other organization having a supporting membership and would reduce Title II of the 1964 Civil Rights Act to an unnecessary *pro tanto* restatement.

Petitioner submits that neither this Court nor any circuit has ever before so held, and the reliance on this Court's decision in *Jones* v. *Mayer* is unjustified. In that case, the potential scope of § 1981 as depriving individuals of their common law right to select their own customers was discussed in footnote 78 (392 U.S. 409 at 441) quoting from the *Civil Rights Cases*, 109 U.S. 3 (1883), that:

> "It would be running the slavery argument into the ground, to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain or as to the people he will take into his coach or cab or car, or admit to his concert or theater, or deal with in other matters of intercourse or business."

This Court there noted that the continued validity of this position might be open to question, but that the problem had been rendered "largely academic" by the passage of Title II of the Civil Rights Act of 1964—the statute under which this action was originally brought.

In short, therefore, *Jones* v. *Mayer* either leaves the question open or reaffirms the absence of any prohibition under § 1981 against private acts of discrimination—except as to the activities defined by the Congress under the 1964 Act.

The other cases cited (App. p. 15a) by the Fourth Circuit involve either state enforcement action, *Valle* v.

Stengel, 176 F.2d 697 (3rd Cir. 1949)*, and *Williams* v. *Kansas City*, 104 F.Supp. 848 (W.D. Mo. 1952) aff'd 205 F.2d 47 (8th Cir. 1953) cert. den. 346 U.S. 826 (1953), or a quasi-public institution—a hospital and a labor union—*United States* v. *Med. Soc. of So. Car.*, 298 F.Supp. 145 (D.S.C. 1969) and *Dobbins* v. *Local 212*, 292 F.Supp. 413 (S.D. Ohio 1968).

Petitioner submits that the interpretation by the lower court of 42 U.S.C. § 1981 to prohibit the arbitrary denial of admission to a non-licensed privately owned picnic park was error and that if any such limitation exists, it must be found in the 1964 Act.

III

The Timberlake Picnic Park is Not a 'Place of Exhibition or Entertainment' Under the 1964 Civil Rights Act

The Fourth Circuit (App. p. 14a) accurately summarized the requirement of proof under this statute:

> "Section 201(a) of Title II of the 1964 Civil Rights Act prohibits discrimination in public accommodations. An establishment is a 'public accommodation' if its operations 'affect commerce' (§ 201(b)) and if it is a 'place of exhibition or entertainment' (§ 201(b)(3)). Such a place of entertainment does affect commerce if 'it customarily presents films, performances, athletic teams, exhibitions or other sources of entertainment which move in commerce. (§ 201(c)(3))."

There are then two fundamental inquiries, (a) does Timberlake customarily present a source of entertainment which (b) moves in commerce.

As to the question of the coverage of 'sources of entertainment', the 1964 Civil Rights Act is specific. It

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* The Third Circuit in *Valle* pointed out that the case did not involve ". . . refusal . . . of accommodations of . . . a place of public amusement by an individual . . ." (p. 703)

was drafted to cover certain activities and exclude others. The Tenth Circuit, analyzing the Act in *Cuevas* v. *Sdrales*, 344 F.2d 1019 (1965) referred to the testimony on this point of Attorney General Kennedy;

> "The coverage was quite explicit. We did not include other establishments which were constitutionally within the reach of federal regulation . . . because we felt that—given a solution to the major problems—removal of these discriminatory practices could be voluntarily induced. We are reluctant to extend federal power beyond those areas where it was clearly needed to meet existing problems.
>
> —Hearings, House Jud. Comm. on H.R. 7152 as am., 88th Cong. 1st Sess., pp. 2655-56."

Senator Humphrey supporting the bill in the Senate agreed

> "The reach of that Title [II] is much narrower than when the bill was first introduced. It is also narrower than S.1732 . . .
>
> . . .
>
> . . . Unless we want to legislate for the whole economy, a line has to be drawn some place, and the bill does it in a sensible place.
>
> (110 Cong. Rec. 6533, March 30, 1964)

Referring to places of "exhibition or entertainment" Senator Kuchel described for the supporters of the bill the adverse effect on interstate commerce sought to be corrected:

> "The market for national entertainment such as community concerts, athletic competitions and motion pictures is surely restricted by such a local situation."
>
> (110 Cong. Rec. 6557, March 30, 1964)

It seems reasonably clear that sunbathing and girl watching are not "national entertainment" in the sense

described by the Senator. The distinction between such self-amusement and statutory 'entertainment' was explained in the "Additional Majority Views on the Bill" of Rep. R. W. Kastenmeier (H. Rep. No. 914, 88th Cong., Second Sess., 1964; Cong. and Adm. News, 1964, page 2410)

> "Discrimination is prohibited in . . . places of entertainment and spectator sports. . . . The bill would allow discrimination to continue in . . . bowling alleys and other places of recreation and participation sports, unless such places serve food."

This intended distinction was affirmed in examples given by the Senate debate captain, Sen. Magnusson

> "The following establishments would therefore, be generally exempt . . . Dance studios, bowling alleys and billiard parlors."
>
> (110 Cong. Rec. 7407, April 9, 1964)

Each exempt activity so named by the Senator is a 'recreation and participation sport', a form of self-amusement not customarily lacking informal spectators. And the distinction of such lookers-on from the concept of a paying non-participating spectator is emphasized in the statutory language requiring that the entertainment be 'presented', a transitive verb having the connotation of taking affirmative action to place entertainment before passive spectators. Clearly, whatever statutory validity sunbathing and girl-watching might otherwise have as a 'source of entertainment,' they are not 'presented' by the petitioner.

It is true that this Court in *Daniel* v. *Paul*, *supra*, adopted the self-amusement interpretation in *Miller* v. *Amusement Enterprises, Inc.*, *supra*, as "entertainment" under Title II, and referred to the "recreational areas" phrase in the February 29, 1963, civil rights message of President Kennedy (395 U.S. 298, at 306). But that message was not referring to the 1964 Civil Rights Act,

the final form of which did not come into existence until more than a year later in a 56 page mimeographed substitute offered by Congressman Celler (Cong. and Adm. News, 88th Congress, Second Sess. 1964, pp. 2415, 2483) to which had been added the limitations on coverage referred to by the Attorney General and the Congressional leaders. And, it would be difficult at this point to evaluate the extent to which these limitations were instrumental in securing a majority acceptance for the close and long-delayed passage of this legislation.

Finally, on the law, in both the *Daniel* and *Miller* situations, a covered eating establishment included in the premises of "Lake Nixon" and "Fun Fair" created explicit jurisdiction under the 1964 Act, without any necessity for the invoked 'place of entertainment' coverage. On the facts, as two large commercial amusement areas advertising continually on radio and television they had nothing in common with Timberlake either as to the interstate character of its activity or by comparison with the four 4″ x 5″ annual advertisements in the Star.

The second requirement of the statute is that the specified sources of entertainment shall move in commerce. Such involvement in commerce is essential since petitioner, by serving persons who may have moved interstate, does not thereby engage himself in commerce, *Williams* v. *Howard Johnson's*, 268 F.2d 875 (4th Cir. 1969), *Elizabeth Hospital, Inc.* v. *Richardson*, 269 F.2d 169 (8th Cir. 1959) and cases cited.

The two 'sources of entertainment' moving in commerce, as given by the Fourth Circuit, were the patrons themselves and Timberlake's recreational equipment. As to the former it must be conceded that any picnicking by local citizens in the Washington area would imply the presence of persons from the District of Columbia and the Maryland and Virginia suburbs. But interstate movement in a single locality on a social occasion is not 'travel' in any sense of 'commerce'. This Court noted

that even professional spectator sports and shows were 'local affair[s]' although their commercial management was not, *United States* v. *Int'l Boxing Club of N. Y.*, 348 U.S. 236, 241 (1954).

> "When the conduct of an enterprise affects commerce among the States is a matter of practical judgment, not to be determined by abstract notions."
>
> *Polish Nat. Alliance* v. *NLRB*, 322 U.S. 643, 650 (1944)

We submit that as a matter of practical judgment, a family drive across the Potomac River to picnic in the Fairfax woods cannot reasonably by interpreted as a movement in "commerce".

Both Courts below also refer to "recreational equipment and apparatus originating out of the state" as sources of entertainment which move in commerce. In a single purchase 10 years ago, petitioner ordered 10 canoes from a Sears Roebuck store in Washington, D. C. No other fact of any character bears on any interstate movement of equipment at Timberlake.* The picnic tables are home made, the inner tubes are obtained locally, the two rafts were made of local timber by petitioner and his sons. The District Court also referred to some sun umbrellas which may have been bought outside of Virginia, but the record is silent. We respectfully submit that a ten year old transaction in 1960 is not a continuing movement "in commerce" of the items so purchased.

Timberlake is not a place of entertainment within the definition of the Civil Rights Act of 1964, and accordingly is not a place of public accommodation subject to the terms of Title II of that statute.

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* On the retrial, the District Court ignored petitioner's offer to stop advertising and dispose of the canoes. (Rec. Letter June 5, 1969)

IV

It Was Patent Error to Revoke an Existing Consent Decree Absent Some Change of Fact

The 1966 consent decree of the District Court was a final order. *May* v. *Moss*, 194 F.2d 133 (8th Cir. 1952). And the only reserved jurisdiction in that decree was:

> ". . . for the purpose of enforcing this injunction . . .". (App. p. 2a)

Yet, the District Court in 1968 stated (App. p. 6a) without further explanation:

> ". . . the Court in its Order of 1966 expressly retained jurisdiction. Even if it had not so done, Rule 60(b)(6) of the Federal Rules of Civil Procedure would permit the Court to grant the additional relief requested upon proper showing."

First, we submit that a reservation of jurisdiction to *enforce* "this injunction" is not a general reservation of future jurisdiction to *reverse* "this injunction" and then to retry the case *de novo* on the same facts. Second, there was no "additional relief" requested. The only relief requested on the retrial was the same relief requested under the original complaint in 1965. Third, while the language of Rule 60(b)(6) allows the setting aside of a final order for

> ". . . (6) any other reason justifying relief from the operation of the judgment."

it has been repeatedly held as to this clause that a change of law is not such a reason

> "It is quite clear that in extraordinary situations, relief from final judgments may be had under Rule 60(b)(6), when such action is appropriate to accomplish justice. *Klapprott* v. *United States*, 335 U.S. 601, 69 S.Ct. 384, 93 L.Ed. 266. A change in the law or in the judicial view of an established rule of law is not such an extraordinary circumstance

which justifies such relief. *Ackermann* v. *United States*, 340 U.S. 193, 71 S.Ct. 209, 95 L.Ed. 207; *Berryhill* v. *United States*, 6 Cir. 199 F.2d 217.

'Litigation must end some time, and the fact that a Court may have made a mistake in the law when entering a judgment, or that there may have been a judicial change in the Court's view of the law after its entry, does not justify setting it aside. *Sunal* v. *Large*, 332 U.S. 174, 67 S.Ct. 1588, 91 L.Ed. 1982; *Simmons Co.* v. *Grier Bros. Co.*, 258 U.S. 82, 42 S.Ct. 196, 66 L.Ed. 475; *Elgin Nat. Watch Co.* v. *Barrett*, 5 Cir. 213 F.2d 776; *Berryhill* v. *United States*, 6 Cir. 199 F.2d 217; *United States* v. *Kunz*, 2 Cir., 163 F.2d 344." *Collins* v. *City of Wichita*, 254 F.2d 837, (10 Cir. 1958).)

Accord, *Title* v. *United States*, 263 F.2d 31 (9th Cir. 1959); *Lehman Co.* v. *Appleton Toy & Furniture Co.*, 148 F.2d 988 (7th Cir. 1945); *Safeway Stores, Inc.* v. *Coe*, 136 F.2d 771 (D.C. Cir. 1943).

We respectfully submit that the District Court's grounds for asserting jurisdiction were without basis either in the earlier decree as entered or in the Federal Rules as cited.

CONCLUSION

The issues here involved are of major proportion in the determination of the future applicability of the Civil Rights Acts, and of decrees entered in such cases. A writ of certiorari should be directed to the United States Court of Appeals for the Fourth Circuit to review the decision.

Respectfully submitted,

GEO. STEPHEN LEONARD
1725 K Street, N.W.
Washington, D. C. 20006
Attorney for Petitioner

Of Counsel:

LARUE VAN METER
207 Park Avenue
Falls Church, Virginia 22046

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 3850

ADA M. SCOTT, for herself, for her daughter, JACQUELYNNE A. SCOTT, an infant, and for others similarly situated,

Plaintiff,

UNITED STATES OF AMERICA, by RAMSEY CLARK, Acting Attorney General,

Plaintiff-Intervenor,

v.

JOSEPH S. YOUNG, d/b/a TIMBERLAKE,

Defendant.

CONSENT DECREE

The parties having stipulated and agreed that the defendant owns and operates a recreational facility at Oakton, Virginia, known as Timberlake, and that there is located on the premises of Timberlake an eating establishment, and all of the parties having consented to the entry of this Order,

Now, therefore, it is hereby ORDERED, ADJUDGED and DECREED that, for so long as there is located on the premises of the recreational facility known as Timberlake the eating establishment heretofore maintained and operated thereon or any other place of public accommodation as defined in Title II of the Civil Rights Act of 1964, 42 U. S. C. 2000a *et seq.*, the defendant Joseph S. Young, his agents, successors, employees and all those in active concert or participation with him are hereby enjoined and restrained from any of the following:

1. From denying the full and equal enjoyment of all the goods, services, facilities, privileges, advantages and accommodations of Timberlake to members of the Negro race or to any other persons on account of race, color, religion or national origin.

2. From doing any thing, directly or indirectly, that may tend to hinder or interfere with the full and equal enjoyment of all the goods, services, facilities, privileges, advantages and accommodations of Timberlake by members of the Negro race or any other persons on account of race, color, religion or national origin.

3. From failing or refusing to post and to keep posted permanently, at the entrance to Timberlake, in a conspicuous place easily visible to and readable by any person entering Timberlake, and in a conspicuous place at or near the eating establishment, a notice, stating as follows: "Notice, Timberlake is a place of public accommodation under the Civil Rights Act of 1964. All of its facilities are open to all persons on an equal basis regardless of race, color, religion or national origin."

This Court retains jurisdiction of the subject matter of this cause and of the parties for the purpose of enforcing this injunction as may be necessary or desirable.

No attorney's fees are awarded. Court costs in the amount of $34.60 are assessed against the defendant.

This the 5th day of December, 1964.

/s/ OREN R. LEWIS
United States District Judge

The undersigned consent to
the entry of this Order:

/s/ Robert M. Alexander
ROBERT M. ALEXANDER
Attorney for Plaintiff

/s/ C. V. Spratley, Jr.
C. V. SPRATLEY, JR.
United States Attorney

/s/ Frank E. Schwell
FRANK E. SCHWELL
Attorney, Department
of Justice

/s/ Leonard E. Ryan
LEONARD E. RYAN
Attorney, Department
of Justice

/s/ LaRue Van Meter
LARUE VAN METER
Attorney for Defendant

A True Copy, Teste:

W. FARLEY POWERS, JR.
Clerk

By /s/ Betty Dodson
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 3850

ADA M. SCOTT, ETC.,
Plaintiff,

UNITED STATES OF AMERICA,
Plaintiff-Intervenor,
v.

JOSEPH S. YOUNG, d/b/a TIMBERLAKE,
Defendant.

MEMORANDUM OPINION

A consent decree was entered herein on December 5, 1966 enjoining the defendant, his agents, successors, employees and all those in active concert or participation with him from denying the full and equal enjoyment of all the goods, services, facilities, privileges, advantages and accommodations of Timberlake to members of the Negro race or to any other person on account of race, color, religion or national origin for so long as there remained located on the Timberlake premises the eating establishment previously maintained and operated by the defendant. Jurisdiction of the subject matter was retained by the Court.

Subsequently the defendant closed his eating facility and continued his racially discriminatory admission policy.

In August 1968 the United States filed a motion for further relief alleging that the defendant's policy of excluding non-white patrons from Timberlake violated § 201(b)(3) of the Civil Rights Act of 1964, contending

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that Timberlake is a place of "entertainment" as defined therein.

Shortly thereafter the original plaintiff filed a motion for further relief contending that defendant's racially discriminatory admission policy at Timberlake violated 42 U.S.C. §§ 1981 and 1982 as those provisions were construed by the Supreme Court of the United States in Jones v. Mayer Company, 392 U.S. 409 (1968).

Both plaintiffs seek further injunctive relief.

The defendant first contends that the Court ought not to entertain the plaintiffs' motions because he has not violated the December 5th injunction—hence there is nothing pending before the Court for adjudication. The defendant further contends that Timberlake is not a place of entertainment as that word is used in the 1964 Civil Rights Act and that it is not within the scope of the Civil Rights Act of 1866.

The facts are not in dispute. They were fully developed by interrogatories and by exhibits filed herein.

Timberlake is a privately owned parcel of land located near Oakton, Virginia—approximately fifteen miles from the District of Columbia and the State of Maryland. The facility in question covers about twenty-three acres and includes two lakes used for swimming, diving, canoeing, fishing, picnicking and sunbathing. It is open to the general public from mid-May through mid-September. It attracts about sixty-five thousand persons per season and grosses about $50,000.00.

There are several floats or rafts located in the lakes, some of which have diving boards. Canoes may be rented by the hour. Inner tubes may be rented by the day. Although equipment therefor is not rentable, patrons may and do use the lakes for fishing and scuba or snorkel diving. The sandy beaches are used, among other things, for sunbathing and girl-watching activities. Umbrellas

are available for rent on a daily basis. There are numerous picnic tables located at various places around the lakes which are rented to patrons—the patrons bring their own food and beverages—none is sold on the premises.

Admission fees are a dollar and a quarter for adults and fifty cents for children, with ninety per cent of the gross receipts coming from admissions.

Most of the patrons reach Timberlake by automobile. Although most come from Virginia, many come from Maryland, the District of Columbia and other states. Road signs are located in Virginia near interstate routes indicating the direction to Timberlake.

The defendant has advertised Timberlake in the Washington Evening Star on several occasions. This newspaper uses the United States mail facilities and is circulated generally in Metropolitan Washington.

The canoes and umbrellas were purchased from merchants in the District of Columbia.

Timberlake is and has been operated on a racially segregated basis at least since the effective date of the Civil Rights Act of 1964. Admission is secured through the admission booth upon paying the requisite fee. White members of the general public are routinely admitted. Negroes and other non-white persons are refused admission.

The defendant's contention that this Court lacks jurisdiction to entertain plaintiffs' motions is without merit. The Court in its order of 1966 expressly retained jurisdiction. Even if it had not so done, Rule 60(b)(6) of the Federal Rules of Civil Procedure would permit the Court to grant the additional relief requested upon proper showing.

The Court finds that Timberlake is a place of entertainment within the meaning of § 201(b)(3) of the Civil

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Rights Act of 1964 and is thereby subject to the proscription of Title II of the Act—Timberlake provides recreational or other activities for the amusement or enjoyment of its patrons. See Miller v. Amusement Enterprises, Inc., 394 F.2d 342 (1968).

The dictionary defines the word "entertainment" as the act of diverting, amusing or causing someone's time to pass agreeably. The services and facilities offered at Timberlake clearly fall within that definition. To hold that Timberlake is not a place of entertainment within the meaning of § 201(b)(3) of the Civil Rights Act of 1964 would violate the basic canon of statutory construction that words are presumed to be used in their ordinary sense.

Further reference is made to Daniel v. Paul, decided by the Supreme Court of the United States on June 2nd of this year. That decision makes it clear that Timberlake is a place of entertainment as that word is used in the Civil Rights Act of 1964.

The facts here found further clearly establish that the operation of Timberlake affects commerce within the meaning of § 201(b)(3) of the Civil Rights Act of 1964. Timberlake makes itself available to all members of the general public. It is conceded that persons using the facilities at Timberlake travel on interstate highways in reaching the facility and that a substantial number cross state lines to get there. Further, Timberlake has in the past advertised in a newspaper having general circulation in Metropolitan Washington and these advertisements point out that Timberlake is easily accessible from the Capital Beltway.

It should be further noted that some of the equipment rented to the patrons was purchased for stores located in the District of Columbia.

From a reading of Jones v. Mayer Company, 392 U.S. 409, recently decided by the Supreme Court of the United

States (1968), it would appear that the defendant's racially discriminatory admission policy deprives the plaintiff of the rights secured by 42 U.S.C. § 1981. That section on its face prohibits all private racially motivated conduct which denies or interferes with the Negro's right to enter into contracts to purchase that which is freely sold to white citizens. It is clear that under common law principles a ticket to a place of entertainment or recreation is regarded as a contract. That was the holding in Valle v. Stengel, 176 F.2d 697 (3rd Cir. 1949).

The relief prayed for by the plaintiffs will be granted.

The attorneys for the plaintiffs should prepare an appropriate order, present it to counsel for the defendant for approval as to form, and then to the Court for entry.

The Clerk will send copies of this memorandum opinion to *all* counsel of record.

/s/ OREN R. LEWIS
United States District Judge

July 10, 1969

A True Copy, Teste:

W. FARLEY POWERS, Jr.
Clerk

By /s/ Betty Dodson
Deputy Clerk

[SEAL]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 3850

ADA M. SCOTT, ETC.,
Plaintiff,

UNITED STATES OF AMERICA,
Plaintiff-Intervenor,

v.

JOSEPH S. YOUNG, d/b/a TIMBERLAKE,
Defendant.

ORDER

The Court having held in its Memorandum Opinion of July 10, 1969, that it had jurisdiction to entertain plaintiffs' motions for further relief and having held that Timberlake is a "place of entertainment" which affects interstate commerce within the meaning of § 201(b)(3) of the Civil Rights Act of 1964, 42 U.S.C. 2000a(b)(3), and that defendant's racially discriminatory admission policy deprives Negroes of the rights secured by 42 U.S.C. § 1981.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Joseph S. Young, together with his agents, employees, successors in interest and all persons in active concert or participation with him or them be, and each is hereby permanently enjoined from

(1) Refusing to admit Negroes and other non-white persons to all facilities of Timberlake upon the same basis and under the same conditions as white members of the general public are admitted to the various facilities of Timberlake;

(2) Failing or refusing to make any of the goods, services, facilities, privileges, advantages or accommodations of Timberlake available to Negroes and other non-white persons upon the same basis and under the same conditions as they are made available to white members of the general public;

(3) Otherwise failing or refusing to make any of the goods, services, facilities, privileges, advantages or accommodations of Timberlake available to Negroes and non-white persons upon the same basis as they are made available to white members of the general public; and

(4) Engaging in any act or practice which deprives, or is intended to deprive, directly or indirectly, any person of the right to the full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of Timberlake without discrimination or segregation on the ground of race or color.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendant shall cause to be posted, within ten days following service of this Order upon him, and shall keep posted through October 1, 1970, at the entrance of the Timberlake facility the following notice: "TIMBERLAKE IS OPEN TO ALL MEMBERS OF THE PUBLIC WITHOUT REGARD TO RACE OR COLOR." Said notice is to be prominently posted on the front of the admission booth to Timberlake in such a position that it is clearly visible to all patrons and potential patrons. It shall be of sufficient size and lettering so as to be easily readable by all patrons and potential patrons.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, in the event defendant advertises Timberlake in any newspaper of general circulation in the Washington, D. C., metropolitan area, he shall cause

to be inserted in all such advertisements, through October 1, 1970, the following notice: "TIMBERLAKE IS OPEN TO ALL MEMBERS OF THE PUBLIC WITHOUT REGARD TO RACE OR COLOR." Such notice shall be of sufficient size and lettering so as to be easily readable by all persons.

AND IT IS FURTHER ORDERED that the United States Marshal forthwith make personal service of a certified copy of this Order on defendant and duly file his Return of Service with the Clerk of this Court. In the event that defendant shall, within ten days of the date of such service upon him, file with the clerk of this Court a notice of appeal and promptly prosecute the same, this Order shall be stayed pending further determination by the Court of Appeals.

The Court retains jurisdiction of the subject matter of this cause and of the parties.

Ordered this ..... day of July, 1969.

/s/ OREN R. LEWIS
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 13,814.

ADA M. SCOTT, for herself, for her daughter, JACQUELYNNE A. SCOTT, an infant, and for others similarly situated,

Appellees,

UNITED STATES OF AMERICA, by RAMSEY CLARK, Attorney General,

Intervenor,

versus

JOSEPH S. YOUNG, d/b/a TIMBERLAKE,

Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Oren R. Lewis, District Judge.

(Argued November 6, 1969 Decided January 16, 1970.)

Before SOBELOFF, WINTER and BUTZNER, Circuit Judges.

LaRue Van Meter for Appellant; John Bleveans, Attorney, Civil Rights Division, Department of Justice, (Jerris Leonard, Assistant Attorney General, David L. Norman, Deputy Assistant Attorney General, Department of Justice, and Brian P. Gettings, United States Attorney, on brief) for Intervenor United States of America, and Allison W. Brown, Jr., (Robert M. Alexander on brief) for Appellee.

SOBELOFF, Circuit Judge:

Timberlake is a privately owned recreational facility in Fairfax County, Virginia, that is open to the white public upon payment of an admission fee, but excludes black and other non-whites.

It covers about 23 acres and encompasses two lakes for swimming, diving, canoeing, fishing, sunbathing and picnicking. There are several floats or rafts in the lakes. Canoes, inner tubes, umbrellas and picnic tables may be rented. No food or beverage is sold on the premises. Admission to Timberlake is $1.25 for adults and 50 cents for children. The establishment is open from mid-May through mid-September, during which time it accommodates about 65,000 persons and grosses about $50,000. Ninety percent of the gross receipts comes from admission charges; the remainder is from rentals. Located approximately 15 miles from the District of Columbia and from Maryland, many of its patrons come by automobile from these localities. Timberlake road signs are planted near interstate routes. Canoes and umbrellas used at Timberlake were purchased in Washington, D.C. The enterprise has advertised in the *Washington Evening Star.*

Suit was originally instituted in 1965. A consent decree, based on Title II of the 1964 Civil Rights Act, was entered on December 5, 1966, enjoining defendant from further discrimination. The judgment, however, was founded on the presence at that time of an eating facility within Timberlake. Subsequently the eating facility was closed and the discriminatory policy was continued.

In August and September 1968 plaintiffs moved in the District Court for further relief and for renewal of the original injunction. The motion was prompted by judicial developments in the interpretation of the Civil Rights

Acts of 1964 and 1866. The District Court granted the requested relief and defendant appeals.

I

Civil Rights Act of 1964 (42 U.S.C. 2000a)

Section 201(a) of Title II of the 1964 Civil Rights Act prohibits discrimination in public accommodations. An establishment is a "public accommodation" if its operations "affect commerce" (§ 201(b)) and if it is a "place of exhibition or entertainment" (§ 201(b)(3)). Such a place of entertainment does affect commerce if "it customarily presents films, performances, athletic teams, exhibitions or other sources of entertainment which move in commerce." (§ 201(c)(3)).

The District Court found that Timberlake is a place of entertainment and that its operations affect commerce. Except that it is smaller in scale, Timberlake is a virtual carbon copy of the Lake Nixon facilities the Supreme Court reviewed in *Daniel* v. *Paul*, 395 U.S. 298 (1969). In that case the Court ruled that a recreational area—in which patrons are not passive spectators but direct participants—is a "place of entertainment" within the meaning of § 201(b)(3). The Supreme Court also concluded in *Daniel* that recreational equipment and apparatus originating out of the state constituted "sources of entertainment which move in commerce" for the purposes of § 201(c)(3). The Court specifically approved *Miller* v. *Amusement Enterprises, Inc.*, 394 F.2d 342 (1968), in which the Fifth Circuit held that patrons themselves, who entertain other patrons by their activity, are "sources of entertainment." Both types of sources, stemming from points beyond the Virginia borders, are found at Timberlake. Accordingly, the District Court's conclusion that Timberlake is within the ambit of the 1964 Act is clearly correct.

II

Civil Rights Act of 1866 (42 U.S.C. 1981)

42 U.S.C. 1981 provides that

> all persons within the jurisdiction of the United States shall have the same right to make and enforce contracts * * * as is enjoyed by white citizens * * *.

In *Jones* v. *Mayer*, 392 U.S. 409 (1968), the Supreme Court dealt with 42 U.S.C. 1982, which is derived from the same clause of the 1866 Act (14 Stat. 27). The Court declared that the Act, which guarantees blacks the right to "purchase [and] lease * * * real and personal property," prohibited a private developer from refusing to sell a house to a Negro. Recently, the same statute was applied to the conveyance of a lease coupled with the right to use a swimming pool. *Sullivan* v. *Little Hunting Park, Inc.*, U.S. (38 USLW 4059) (Dec. 15, 1969). The provision invoked in this case, § 1981, the sister to § 1982, must be construed in similar broad fashion.

The Timberlake proprietors bestow the right of admission in return for a fee. This is unquestionably a contract. *Marrone* v. *Washington Jockey Club*, 227 U.S. 633, 636 (1913) (Holmes, J.); *Watkins* v. *Oaklawn Jockey Club*, 86 F.Supp. 1006, 1016 (W.D. Ark. 1949), *aff'd*, 183 F.2d 440 (8th Cir. 1950); *W. M. V. Co.* v. *Black*, 113 Va. 728, 75 S.E. 82 (1912). Refusal to extend the same contractual opportunity to blacks is, as the District Court decided, a violation of 42 U.S.C. § 1981. *Valle* v. *Stengel*, 176 F.2d 697 (3rd Cir. 1949); *United States* v. *Medical Society of South Carolina*, 298 F. Supp. 145, 152 (D.S.C. 1969); *Dobbins* v. *Local 212, International Brotherhood of Electrical Workers*, 292 F. Supp. 413, 442 (S.D. Ohio 1968); *Williams* v. *Kansas City, Missouri*, 104 F. Supp. 848, 859 (W.D. Mo. 1952), *aff'd*, 205 F.2d 47 (8th Cir. 1953), *cert. denied*, 346 U.S. 826 (1953).

III

Plaintiff, Ada Scott, has moved under 42 U.S.C. 2000a-3(b) for allowance of attorney fees for this appeal. The motion is granted and the case is remanded to the District Court to determine the amount.

Affirmed and Remanded.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 13,814.

ADA M. SCOTT, for herself, for her daughter, JACQUELYNNE A. SCOTT, an infant, and for others similarly situated,

Appellee,

UNITED STATES OF AMERICA, by RAMSEY CLARK, Attorney General,

Intervenor,

versus

JOSEPH S. YOUNG, d/b/a TIMBERLAKE,

Appellant.

Appeal from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof it is here ordered and adjudged by this Court that the judgment of said District Court appeal from in this cause be, and the same is hereby, affirmed; and the case is remanded to the U. S. District Court for the Eastern District of Virginia at Alexandria to determine the amount of attorneys fees for this appeal. This is a certified copy.

/s/ SAMUEL W. PHILLIPS
SAMUEL W. PHILLIPS
Clerk
Attest to Being True Copy

/s/ MARGARET M. WALTON
MARGARET M. WALTON
Deputy Clerk

Filed: January 16, 1970

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1420

JOSEPH F. YOUNG, PETITIONER

v.

ADA M. SCOTT, ET AL. and UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 12a) is reported at 421 F. 2d 143. The opinion of the district court (Pet. App. 4a) is reported at 307 F. Supp. 1005.

JURISDICTION

The judgment of the court of appeals (Pet. App. 17a) was entered on January 16, 1970. The petition for writ of certiorari was filed on April 13, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

(1) Whether the court of appeals was correct in its finding that 42 U.S.C. 1981 guarantees to Negroes the same right to purchase admission to a recreational area as is enjoyed by white citizens.

(2) Whether the court of appeals was correct in its finding that exclusion of Negroes from petitioner's recreational facility violated that portion of the Civil Rights Act of 1964 which bars racial discrimination at places of entertainment.

STATUTES INVOLVED

Pertinent excerpts from the Civil Rights Act of 1866 and the Civil Rights Act of 1964 are set forth at pages 3-4 of the petition.

STATEMENT

This action was commenced in October 1965 by Negro citizens who sought an order enjoining petitioner from operating his outdoor recreational facility (known as "Timberlake") on a racially discriminatory basis in violation of Title II of the Civil Rights Act of 1964, 42 U.S.C. 2000a. Timberlake is a twenty-three acre operation in suburban Virginia, which offers swimming, canoeing, fishing and picnicking to some sixty-five thousand persons each season, who pay an entrance fee of fifty cents to one dollar and a quarter and may rent equipment for an additional charge.

The United States intervened in the suit in October 1966, in support of the private plaintiffs. A con-

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sent decree, premised on the presence of an eating facility within Timberlake and the resulting application of the Civil Rights Act of 1964, was entered on December 5, 1966, enjoining petitioner from further discrimination (Pet. App. 1a). After entry of the injunction, the eating facility was closed and the discrimination continued. In August 1968 the United States moved for supplemental relief, alleging that, even without the eating facility, petitioner's continued policy of racial discrimination violated the Civil Rights Act of 1964. The government contended that Timberlake was a place of entertainment within the meaning of 42 U.S.C. 2000a(b)(3). The Negro plaintiffs filed a motion for supplemental relief contending that petitioner's policies violated 42 U.S.C. 1981 and 1982. The district court granted both motions, basing its decision on *Daniel* v. *Paul*, 395 U.S. 298; *Miller* v. *Amusement Enterprises, Inc.*, 394 F. 2d 342 (*en banc*), and *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (Pet. App. 7a-8a). The court of appeals affirmed, invoking the same authority (Pet. App. 14a-15a).

ARGUMENT

Petitioner has operated Timberlake on a racially segregated basis at least since the effective date of the Civil Rights Act of 1964 (Pet. App. 6a). For white members of the general public, admission to Timberlake is secured by presenting oneself at the admission booth and paying the requisite fee (Pet. App. 6a). Negroes and other nonwhite persons are routinely excluded (Pet. App. 6a). Petitioner main-

tains that he has a "common law" right to limit admission to white persons, and that his prerogative to do so is unaffected by any congressional enactment now in effect. He submits that the court of appeals erred in interpreting 42 U.S.C. 1981 to prohibit his arbitrary exclusion of Negroes from Timberlake and, further, that the court of appeals also erred in finding that Timberlake was a "place of exhibition or entertainment" under the 1964 Civil Rights Act and, therefore, subject to the anti-discrimination provision of that act.[1]

1. The court of appeals correctly construed 42 U.S.C. 1981 to prohibit racial discrimination by petitioner in the operation of the Timberlake recreational park. There can be no doubt that purchase of an admission ticket to Timberlake sets up a contractual relationship between petitioner, as proprietor, and the purchaser. See, *e.g.*, *Marrone* v. *Washington Jockey Club*, 227 U.S. 633, 636; *Williams* v. *Kansas City, Missouri*, 104 F. Supp. 848, 859 (W.D. Mo.), affirmed, 205 F. 2d 47 (C.A. 8), certiorari denied, 346 U.S. 826. In light of this Court's decisions in *Jones*

[1] Petitioner also suggests that the district court's decision amounted to an improper reopening of a final judgment. He says that the change in decisional law which occurred between 1966 and 1969 cannot serve as a basis for the supplemental relief which was granted. The district court, however, properly held that the consent decree was a judicial act possessing the same force and character as a nonconsensual judgment, see, *e.g.*, *Pope* v. *United States*, 323 U.S. 1, 12; *United States* v. *Swift & Co.*, 286 U.S. 106, 115, and that supplemental relief, upon the grounds stated, could be appropriately granted. See *System Federation* v. *Wright*, 364 U.S. 642, 651; *United States* v. *Swift & Co.*, *supra* at 114-115.

v. *Alfred H. Mayer Co.*, 392 U.S. 409 and *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, it is equally clear that petitioner's racially discriminatory admission policy deprives Negroes of the rights secured by 42 U.S.C. 1981.

That statute, in pertinent part, provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts * * * as is enjoyed by white citizens." In *Jones* v. *Alfred H. Mayer Co.*, 42 U.S.C. 1982 [2] was held to prohibit private, racially motivated refusals to sell real property. In so ruling, the Court stressed that the 1866 Act "was meant to prohibit *all* racially motivated deprivations of the rights enumerated in the statute * * *." 392 U.S. at 426. It is of course unnecessary to decide here whether every transaction or relationship which could formally be characterized as "contractual" brings Section 1981 into play. Thus, it may well be that membership in a *bona fide* private club—not involved here—and other purely social or personal arrangements are beyond the intended reach of the statute. Our present submission is only that ordinary commercial contracts are covered, including those relating to privately-owned places of *public* accommo-

[2] Section 1982 gives to Negroes the same right to "purchase [and] lease * * * real and personal property" as is enjoyed by white citizens. Like 42 U.S.C. 1981, § 1982 was derived from Section 1 of the Civil Rights Act of 1866. Act of April 9, 1866, c. 31, § 1, re-enacted by § 18 of the Enforcement Act of 1870, Act of May 31, 1870, c. 114, § 18, 16 Stat. 140, 144 and codified in Sections 1977 and 1978 of the Revised Statutes of 1874, now 42 U.S.C. 1981 and 1982.

dation, which—except for the race barrier—admit all persons indiscriminately. See *Valle* v. *Stengel*, 176 F. 2d 697 (C.A. 3). Cf. *United States* v. *Medical Society of South Carolina*, 298 F. Supp. 145, 152 (D.S.C.); *Dobbins* v. *Local 212, International Brotherhood of Electrical Workers*, 292 F. Supp. 413, 442 (S.D. Ohio). By excluding nonwhites from Timberlake, petitioner has impaired the right of Negroes "to make and enforce contracts" on the same basis as white persons and has, therefore, violated § 1981.

2. The court of appeals was also correct in its finding that petitioner's exclusion of Negroes from Timberlake violated Section 201(a) of Title II of the 1964 Civil Rights Act, 42 U.S.C. 2000a, *et seq.* Sections 201(b)(3) and 201(c)(3) of the 1964 Civil Rights Act, taken together, prohibit the proprietor of "any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment" which "customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce," from discrimination on the ground of race or color. 42 U.S.C. 2000a(b)(3), 2000a(c)(3). Petitioner maintains that he is not governed by this Act because Timberlake is not a place of "exhibition or entertainment" under sections 201(b)(3) and 201(c)(3) since his facility has no "sources of entertainment" which move in commerce.

This Court considered and rejected these same arguments in *Daniel* v. *Paul*, 395 U.S. 298. Here, as in that case, the petitioner provides recreation and entertainment for interstate travelers (Pet. App.

7a). Moreover, included among the "sources of entertainment" which petitioner makes available for his customers, are recreational equipment and apparatus (*e.g.*, canoes and umbrellas) which were purchased out of state (Pet. App. 6a). In *Daniel* v. *Paul*, when dealing with a recreational facility similar to Timberlake, this Court said:

> In light of the overriding purpose of Title II "to remove the daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public," H.R. Rep. No. 914, 88th Cong., 1st Sess., 18, we agree with the *en banc* decision of the Court of Appeals for the Fifth Circuit in *Miller* v. *Amusement Enterprises, Inc.*, 394 F. 2d 342 (1968), that the statutory language "place of entertainment" should be given full effect according to its generally accepted meaning and applied to recreational areas.

395 U.S. at 307-308. This Court further held:

> The legislative history indicates that mechanical sources of entertainment such as these [boats, juke box and phonograph records] were considered by Congress to be "sources of entertainment" within the meaning of § 201(c)(3).

Id. at 308. Plainly, as the court of appeals found, this holding is also controlling here.

The decision below is not, as petitioner suggests, and unwarranted expansion of this Court's previous rulings. Indeed, the court of appeals correctly conceived the action as presenting questions already resolved by this Court, and, therefore, properly invoked

both *Jones* v. *Alfred H. Mayer Co.* and *Daniel* v. *Paul.*

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JERRIS LEONARD,
Assistant Attorney General.

MAY 1970.

☆ U. S. GOVERNMENT PRINTING OFFICE, 1970 383946 670

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1420

JOSEPH F. YOUNG,

Petitioner,

v.

ADA M. SCOTT, et al.,

and

UNITED STATES OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF ADA M. SCOTT IN OPPOSITION

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
A. Proceedings Below	2
B. Facts	4
ARGUMENT	5
CONCLUSION	7

AUTHORITIES CITED

Cases:

Daniel v. Paul, 395 U.S. 298 (1969)	5, 6
Griffin v. State Board of Education, 296 F.Supp. 1178, (E.D. Va., 1969)	6
Jones v. Mayer Co., 392 U.S. 409 (1968)	6
Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969)	6
System Federation No. 91 v. Wright, 364 U.S. 642 (1961)	6
United States v. Swift & Co., 286 U.S. 106 (1932)	6

Statutes:

Civil Rights Act of 1866:	
42 U.S.C. 1981	2, 3, 6
42 U.S.C. 1982	2, 3
Civil Rights Act of 1964:	
42 U.S.C. 2000a	2, 3, 5

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OPINIONS BELOW

The opinion of the District Court (Pet. 4a-8a) is reported at 307 F.Supp. 1005 (E.D. Va., Alexandria Div.). The opinion of the Court of Appeals (Pet. 12a-16a) is reported at 421 F.2d 143.

JURISDICTION

The decision and judgment of the court below were entered on January 16, 1970. The petition for a writ of certiorari was filed on April 13, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the racial discrimination practiced by Timberlake is prohibited by Title II of the Civil Rights Act of 1964 (42 U.S.C. Sec. 2000a).

2. Whether the racial discrimination practiced by Timberlake is prohibited by the Civil Rights Act of 1866 (42 U.S.C. Sec. 1981).

STATUTES INVOLVED

The pertinent provisions of the Civil Rights Act of 1964 (42 U.S.C. Sec. 2000a) and of the Civil Rights Act of 1866 (42 U.S.C. Sec. 1981, 1982) are set forth at pp. 3-4 of the petition.

STATEMENT OF THE CASE

A. PROCEEDINGS BELOW

The complaint herein was filed on October 6, 1965, by Ada M. Scott, a Negro, on behalf of herself, her daughter, Jacquelynne A. Scott[1] an infant, and others similarly situated. The complaint requested an injunction prohibiting Joseph S. Young[2] from following a policy and practice of racial discrimination in the operation of an outdoor recre-

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[1]The correct name of this party is Jacquelynne A. Scott. It is incorrectly stated in the petition to this Court as Jacqueline A. Scott.

[2]The correct name of petitioner is Joseph S. Young. It is incorrectly stated in the petition to this Court as Joseph F. Young.

ational facility known as "Timberlake", which he owns and operates in Fairfax County, Virginia. The claim to relief was based on the provisions of the Civil Rights Act of 1964 forbidding discrimination in places of public accommodation. 42 U.S.C. Sec. 2000a. On December 5, 1966, a consent decree was entered by the district court enjoining petitioner from excluding Negroes from the premises of Timberlake or from otherwise discriminating against persons on the basis of race, color, religion or national origin (Pet. 1a-3a).[3] The judgment was premised on the inclusion within the Timberlake establishment of an eating facility which served Timberlake patrons. Petitioner subsequently closed the eating facility and continued operating Timberlake on a racially discriminatory basis.

In August and September 1968, following judicial decisions announcing significant developments in the interpretation of federal laws concerning discrimination by establishments such as Timberlake, respondents moved in the District Court for further relief on the basis of provisions of the Civil Rights Act of 1964 (42 U.S.C. Sec. 2000a), and of the Civil Rights Act of 1866 (42 U.S.C. Secs. 1981, 1982). Petitioner opposed the granting of further relief, but the District Court granted the relief prayed for (Pet. 4a-8a). The Court held that Timberlake is a "place of entertainment" within the meaning of Section 201(b)(3) of the Civil Rights Act of 1964, and is thereby subject to the proscription of that Act against discrimination on the ground of race, color, religion or national origin in places of public accommodation. The District Court also held that the racial discrimination practiced by Timberlake violates the provision of the 1866 Act retained in 42 U.S.C. Sec. 1981. The District Judge (Lewis, J.) refused to stay the effectiveness of that court's order pending an appeal. Petitioner appealed, and on August 8, 1969, Judge Butzner of the

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[3]The correct date of entry of the consent decree was December 5, 1966. It is incorrectly stated in the appendix to the petition as December 5, 1964 (Pet. 2a).

Court of Appeals likewise denied petitioner's application for a stay of the District Court's order. On January 16, 1970, the Court of Appeals issued its decision affirming the District Court's decision in all respects (Pet. 12a-16a).[4]

B. FACTS

Timberlake is a privately owned recreation park located near Oakton in Fairfax County, Virginia, approximately 15 miles from the District of Columbia and the State of Maryland. It covers about 23 acres and includes two lakes with facilities for swimming, diving, canoeing, fishing, sunbathing and picnicking. It is open to the general public from mid-May through mid-September. It attracts about 65,000 persons per season and grosses about $50,000.

There are several floats or rafts located in the lakes, some of which have diving boards. Canoes may be rented by the hour. Inner tubes may be rented by the day. Patrons also engage in scuba and snorkel diving. The sandy beaches are used for sunbathing, and provide a vantage point for watching others engaged in aquatic and other recreational activities. Umbrellas are available for rent on a daily basis. There are numerous picnic tables located at various places around the lakes, which are rented to patrons. Patrons bring their own food and beverage, as none is sold on the premises.

Admission fees to Timberlake are $1.25 for adults and 50¢ for children. Ninety percent of the gross receipts come from admissions—the rest from equipment rentals.

Most of the patrons reach Timberlake by automobile. Although most come from Virginia, many come from Maryland, the District of Columbia and other states. Road signs are located in Virginia near interstate routes indicating the direction to Timberlake. Defendant has advertised

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[4]The facts set out herein are based on the District Court's findings as derived from petitioner's answers to interrogatories, as well as from exhibits introduced and made part of the record.

Timberlake in the *Washington Evening Star* on several occasions. This newspaper uses the United States mail facilities and is circulated generally in the Washington metropolitan area. Timberlake's canoes and umbrellas were purchased from merchants in the District of Columbia.[5]

Timberlake is and has been operated on a racially segregated basis, at least since mid-1964. Admission is secured through the admission booth upon paying the requisite fee. White members of the general public are routinely admitted. Negroes and other non-white persons are refused admission.

ARGUMENT

The Court of Appeals and District Court were plainly correct in holding that the racial discrimination practiced by Timberlake is proscribed by federal statutes. Under this Court's recent decisions, it is clear that both Title II of the Civil Rights Act of 1964, as well as the Civil Rights Act of 1866 apply to this business establishment.

1. As the Court of Appeals held, Timberlake is a "carbon copy" of the Lake Nixon facilities reviewed by the Court in *Daniel v. Paul*, 395 U.S. 298 (1969). In that case, the Court ruled that a recreational area in which patrons are not passive spectators, but direct participants, is a "place of entertainment" within the meaning of Section 201(b)(3) of the 1964 Act. Swimming, boating, sun bathing, picnicking—the same activities available at Lake Nixon—are also enjoyed by Timberlake's customers. In addition, here, as at Lake Nixon, the patronage of out-of-state customers, as well as the use of equipment originating out of the state, provide the required nexus with interstate commerce, thus

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[5]Petitioner incorrectly states that the "record is silent" concerning the source of its umbrellas (Pet. 14). In its answers to interrogatories, petitioner stated that it has 30 umbrellas available for patrons, which were purchased from the Quality Umbrella Shop, Washington, D.C.

making the 1964 Act applicable. In sum, this case, on its facts, is indistinguishable from *Daniel v. Paul*, and petitioner's assertion to the contrary is wholly without merit.

2. The alternative holding of the courts below—that Timberlake's discriminatory admission policy violates rights of Negroes secured by 42 U.S.C. 1981—is fully supported by this Court's recent decisions in *Jones v. Mayer Co.*, 392 U.S. 409 (1968) and *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969). Section 1981, as the District Court held, "on its face prohibits all private racially motivated conduct which denies or interferes with the Negro's right to enter into contracts to purchase that which is freely sold to white citizens" (Pet. 8a). Since, under common law authorities cited by the courts below, a ticket to a place of entertainment or recreation is a contract. Timberlake's denial of this contractual opportunity to Negroes unquestionably violates Section 1981.

3. There is no substance to petitioner's assertion that the District Court lacked authority to grant additional relief in this case. As that court noted, not only did it expressly retain jurisdiction under the 1966 consent order, but even if it had not done so, Rule 60(b)(6) of the Federal Rules of Civil Procedure permitted it to grant the additional relief requested upon proper showing. Clearly, changed law occasioned by new judicial decisions was such a showing. *System Federation No. 91 v. Wright*, 364 U.S. 642, 646-651 (1961); *Griffin v. State Board of Education*, 296 F.Supp. 1178, 1182 (E.D. Va., 1969); *United States v. Swift & Co.*, 286 U.S. 106, 114-115 (1932).

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CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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REPLY BRIEF

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1. The absence of any respondent citation interpreting the 'contract' provision of the 1866 Civil Rights Act, (42 U.S.C. 1981), confirms petitioner's position that the broad reading given to this section by the Fourth Circuit is a holding of first impression.

2. Equally, the point is one of major federal importance. Contrary to both respondent briefs, petitioner not only has not claimed that a ticket is not a 'contract', but has instead relied on that fact to show the virtually unlimited applicability of the decision below. So applied, that ruling would judicially extinguish every exception made by Congress in Title II of the 1964 Civil Rights Act.

3. Neither respondent attempts to show the essential prerequisite right of the statutory "white citizens" to compel admission to Timberlake, (Pet. p. 7).

4. We amend, with acknowledgment to the individual respondent, the reference to the umbrellas (Resp. Bf. ftn. 5). The correct record citation is

"19.(a) There are approximately 30 umbrellas available.

(b) The original cost was $10.00 each. They were purchased 5 years ago from Quality Umbrella Shop, Washington, D. C."

Respectfully submitted.

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